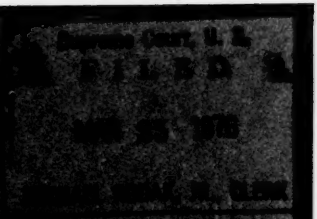

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR THE NINTH CIRCUIT

Petitioner, ROY D. GARNER, prays that a Writ of Certiorari issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of conviction for the violation of Title 18, U.S.C. §1343, fraud by wire, entered in the United States District Court for the District of Nevada.

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OPINION BELOW

The unpublished memorandum of the panel, dated October 21, 1975, is printed in the appendix hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1975 (Appendix A). A timely Petition for Rehearing was denied on February 24, 1976 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

1) Whether the Pacific Telephone and Telegraph Company violated Title 47, U.S.C. §605, and Title 18, U.S.C. §2511 by intercepting and disclosing to the Government the contents of defendant's wire communications without an appropriate Court Crder or Subpoena.

2) Whether telephone conversations recorded in violation of State law should be admitted in Federal Criminal prosecutions.

3) Whether the telephone company's continued use of a "pen register" placed upon defendant's telephone after the criminal investigation had been turned over to the

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Government was violative of the Fourth Amendment's proscription against unlawful searches and seizures.

4) Whether an indictment sufficiently allges the "scheme and artifice to defraud" committed by defendant in accordance with Rule 7(c) Federal Rules of Criminal Procedure, and the Sixth Amendment's guarantee of the right of defendant to be informed of the nature of the accusation against him when the indictment simply charges the use of a "bluebox."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FOURTH AMENDMENT:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

18 U.S.C. §1343:

"Whoever, having devised or intending to devise any scheme or artifice

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to defraud . . . transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any . . . signals . . . or sounds for the purpose of executing such schele or artifice, shall be fined, not more than $1000.00 or imprisoned not more than five years, or both."

Title 47, U.S.C. §605:

"Except as authorized by Chapter 119, Title 18, no person receiving, assisting in receiving, transmitting or assisting in transmitting any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception: (1) to any person other than the addressee, his agent, or attorney, (2) any person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a Court of competent jurisdiction, or (6) on demand of other lawful authority. * * *"

18 U.S.C. §2511(2)(a):

"It shall not be unlawful under this chapter for an . . . employee, or an

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agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier. . . ."

California Penal Code §631:

"(a) Prohibited Acts; . . . Any person who, . . . intentionally taps, or makes any unauthorized connection, whether physically, electrically, accoustically, inductively, or otherwise, with any telephone or telegraph wire . . . or who willfully, and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication, while the same is in transit, or passing over such wire . . . or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained . . . is punishable by a fine not exceeding Two Thousand, Five Hundred Dollars ($2500.00), or by imprisonment in the County jail or in the State prison. * * *"

California Penal Code §632(b).

"(b) Person. The term 'person' includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication.."

STATEMENT OF THE CASE

Petitioner was charged in a one-count indictment with violation of Title 18, U.S.C. §1343, fraud by wire. Specifically, it was charged that he devised a scheme to defraud the Bell Telephone Company of Nevada of monies due for long distance telephone calls through the use of an electronic device commonly referred to as a "bluebox."

Motions to dismiss the indictment for failure to allege fraud sufficiently, Rule 12, F.R. Crim. P. and to suppress certain tape recorded telephone conversations intercepted by agents of the telephone company, Rule 41 (f), F.R. Crim. P. were denied by the District Court in a five-page opinion.

Petitioner was convicted in a trial by jury and sentenced to imprisonment for a period of

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two years.

The facts of the case are not in dispute: On the basis of analysis of a computer printout in April of 1974, a security agent for the Pacific Telephone and Telegraph Company determined that someone at defendant's residence in Reno, Nevada, was committing electronic toll fraud by using a "bluebox."

A "bluebox" is an electronic device, attached to the telephone, which permits the use of long distance interstate facilities of the telephone company free of charge. The device is used to circumvent the record keeping and billing equipment of the telephone company.

On May 16, 1974, the agent placed an electronic detector on petitioner's telephone line and determined that, indeed, a "bluebox" was being used.

On August 29, 1974, at the Pacific Telephone and Telegraph office in Sacramento, California, the agent placed special equipment across the line, including a dialed number recorder, commonly known as a pen register, together with a special two-minute timer controlled magnetic tape recorder which would be activated by the use of the "bluebox."

For the next five days the agent recorded the first two minutes of 35 telephone calls placed with the aid of a "bluebox." The called parties were identified by name on 18 occasions, and the caller identified himself as Roy Garner on two

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occasions. After September 2, 1974, the "blue-box" detector and two-minute timer controlled tape recorder were removed from the line. The pen register, however, was kept in operation until December 2, 1974.

On September 20, 1974, the telephone company's security agent contacted the Federal Bureau of Investigation and, pursuant to the request of an FBI agent, transferred his entire investigatory file to the agency.

At trial, the Government was permitted to introduce into evidence many of the conversations recorded between August 29 and September 2, as well as the pen register records of all outgoing telephone calls dialed from Petitioner's telephone between September 2 and December 2 of 1974.

REASONS FOR GRANTING THE WRIT

There is an apparent facial conflict between Title 47, U.S.C. §605 and Title 18, U.S.C. §2511(2)(a) in that the former statute purports to prohibit what the latter allows. The Court of Appeals for the Fifth Circuit has ruled that 18 U.S.C. §2511(2)(a)(i) permits a telephone company which has reasonable grounds to suspect that its billing procedures are being by-passed to monitor any phone from which it believes illegal calls are being placed and further, that the company may divulge the existence and content of these calls to law enforcement

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authorities. United States v. Clegg, 509 F.2d 605 (Fifth Circuit 1975). Such disclosures are said to be "authorized" under 18 U.S.C. §2517 (3). The Ninth Circuit has chosen to follow Clegg. See United States v. Glanzer, 521 F.2d 12 (9th Circuit 1975).

However, 47 U.S.C. §605 prohibits such divulgence of telephone communications in the absence of a Subpoena or a demand from lawful authority, neither of which were present in the instant case. In the case at bar, the Court has attempted to harmonize the statutes by interpreting the exception which precedes the prohibitory language of §605 ("except as authorized by Chapter 119, Title 18. . . .") to negate entirely the effect of §605. Congress in Title III repeatedly used the word "authorized" to mean Court authorized wire taps, and it is clear from a comprehensive reading of Title III that although an interception by the telephone company may be "not unlawful" as that term is used in §2511, nowhere in §2511 does Congress make interceptions and disclosures to law enforcement officers by telephone company employees "authorized" interceptions and disclosures. The fact that it is not unlawful under §2511(2)(a)(i) for the telphone company to intercept and disclose confidential communications in the normal course of business does not make such interceptions admissible in Federal Court. On the contrary, because such interceptions have not been properly authorized by a Court, they are inadmissible. See 18 U.S.C. §2517 and §2518.

The Federal Courts have adopted a practice of allowing in evidence telephone

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conversations recorded in violation of State penal statutes enacted to guarantee the citizen's right to privacy. See U.S. v. Keen, 508 F.2d 986 (9th Circuit 1974). The Courts have reasoned that such evidence is admissible since there has been no violation of the Federal Constitution or Federal law inherent in their seizure.

This reasoning, however, overlooks the violation of the Ninth Amendment's guarantee of the citizen's right to privacy. See Griswold v. Connecticut, 381 U.S. 479 (1965) and the Tenth Amendment's reservation of power to the individual states. Title III does not purport to supercede the operation of state penal laws and it is submitted that the Federal Courts must permit the valid exercise of the police powers of the states unless Congress has clearly expressed a contrary intention. See Reid v. Colorado, 187 U.S. 137 (1902); California v. Zook, 337 U.S. 725 (1949).

ARGUMENT

I

THE TELEPHONE COMPANY INTERCEPTED AND DISCLOSED THE CONTENTS OF PETITIONER'S WIRE COMMUNICATIONS IN VIOLATION OF TITLE 47, U.S.C. §605 AND TITLE 18, U.S.C. §2511

In the instant case, the information relative to the existence and contents of Petitioner's wire

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communications was disclosed to F.B.I. Agent, John A. Norris, Jr., voluntarily by Mr. Jack Covey, a security agent for Pacific Telephone and Telegraph Company in Sacramento. There is no indication that the information was divulged "(5) in response to a subpena issued by a Court of competent jurisdiction, or (6) on demand of other lawful authority," as required by §605, and unless there is an exception permitting such disclosure in 18 U.S.C. §2511, it would appear that §605 has been violated, and that the tapes are inadmissible.

Conditions under which wire communications may lawfully be intercepted and/or divulged are set forth in 18 U.S.C. §2511, a prohibitory statute which proscribed punishment and imprisonment for the willful interception of wire and oral communications. Section 2511(2)(a) exempts certain persons from its prohibition as follows:

> "(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication. . . .

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"(ii) It shall not be unlawful under this chapter for an officer, employee or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigator, or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication." (Emphasis added.)

The foregoing statutory provisions would seem to allow an employee of the telephone company to intercept and disclose the contents of a telephone conversation as a necessary incident to the protection of the rights or property of the telephone company. However, the fact that the interception and disclosure is not made unlawful does not mean that it has been intercepted by means "authorized" by Chapter 119. Therefore, unless the interception and disclosure of a communication has been accomplished pursuant to an "authorized" wire tap, §605 has been violated.

18 U.S.C. §2517 sets forth the instances wherein disclosure and use of intercepted wire or telephonic communications is permitted. The only way communications may be intercepted in an "authorized" manner, is through compliance with the mandates of §2516, which requires that requests for authorizations be submitted to a Federal Judge after approval by the Attorney General, or his specially designated assistant. Additionally, §2516 lists the Fedeal offenses for which an authorized

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Federal wire tap may be sought. The offense of wire fraud in violation of Title 18 U.S.C. §1343 is not one of those listed in §2516, and it is readily apparent, therefore, that no "authorized" order for a wire tap could issue under Chapter 119.

The circumstances under which the fruits of an "authorized" wire tap may be disclosed are set forth in 18 U.S.C. §2517. Section 2517(3) provides as follows:

> "Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any state or political subdivision thereof." (Emphasis added.)

The foregoing language permits the disclosure of information received pursuant to authorized wire tap; it does not permit the disclosure of conversations intercepted by telephone company employees in its attempts to detect fraud, and in the absence of a Court order.

Section 2518(9) provides in part:

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"The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State Court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the Court Order, and accompanying application, under which the interception was authorized or approved. * * *" (Emphasis added.)

The foregoing language plainly renders the telephone company's tapes inadmissible.

The Fifth Circuit's ruling in United States v. Clegg, 509 F.2d 605 (1975), upon which the Ninth Circuit panel relied, failed to consider that §605 still requires the telephone company's divulgence to be made "(5) In response to a subpena issued by a Court of competent jurisdiction, or (6) on demand of other lawful authority," a point specifically recognized in Bubis v. United States, 384 F.2d 643 (9th Cir. 1967).

If Section 2511(2)(a) is interpreted to dispense with the requirement of a subpoena or a demand from lawful authority, then it is submitted that §605 has become a nullity.

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II

THE TELEPHONE CONVERSATIONS WERE RECORDED AND DISCLOSED IN VIOLATION OF STATE LAW AND THE FEDERAL CONSTITUTION

The telephone conversations were recorded by agents of the telephone company in Sacramento, California. This constituted a violation of California Penal Code §631, which prohibits all forms of wire tapping. The penal statute does not apply, however.

> "(1) To any public utility engaged in the business of providing communication services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility. * * *" (California Penal Code §631[b].)

The telephone company's acts in this case do not fall within the exceptions of §631(b) because the recordings were not made for the purposes of construction, maintenance, conduct or operations of the services and facilities of the telephone company.

Section 637 of the California Penal Code provides for the punishment of a party who

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discloses the contents of a telphonic message.

> "Every person not a party to the telegraphic or telephonic communication who willfully discloses the contents of a telephonic or telegraphic message, or any part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a Court, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars ($5,000.00), or by both fine and imprisonment."

It would, therefore, appear that even if the telephone company could lawfully intercept a conversation in Sacramento, the divulging of the contents in this case was a felony in violation of §637. It has been held in California that the provisions of 18 U.S.C. §2510 through §2520 preempt the field of wire communications except in those areas where state law imposes stricter laws designed to protect the right of privacy. Halpin v. Superior Court, 6 Cal.3d 883 (1972); People v. Jones, 30 Cal.App.3d 852 (1973). In Head v. New Mexico Board, 374 U.S. 424 (1963), this Court stated:

> "In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such

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actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' [Citation]." Id. at p. 430.

California Penal Code §637 does not conflict with §2511 of Title III, but is simply more restrictive on its face than is that statute. As in 47 U.S.C. §605, disclosure is lawful only upon order of a Court. There being no conflict of state law with the Federal law, §637 applies.

III

EVIDENCE DERIVED FROM THE "PEN REGISTER" PLACED UPON PETITIONER'S TELEPHONE FROM SEPTEMBER 17TH TO DECEMBER 2ND, 1974, SHOULD HAVE BEEN SUPPRESSED BECAUSE IT WAS NOT GATHERED IN THE COURSE OF ANY LEGITIMATE INVESTIGATION BY THE TELEPHONE COMPANY AND THEREBY CONSTITUTED AN UNLAWFUL INTERCEPTION OF WIRE COMMUNICATION

During the course of the trial, it was disclosed that Jack Covey, agent for Nevada Bell and Pacific Telephone and Telegraph, continued to employ a "pen register" device on Petitioner's telephone after he had completed his investigation

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of possible fraud and turned all of his records and reports over to the F.B.I. as of September 17, 1974. It is obvious that once the case had been turned over to the Federal Government for prosecution, there could be no valid continuing investigation of Mr. Garner without court authorization. Had the Government desired to install the pen register, it would unquestionably have had to obtain a Court authorization therefor pursuant to 18 U.S.C. §2510, et seq. The telephone company may not lawlessly perform acts prohibited to Federal agents, and then deliver to the Government the fruits of such investigation on the proverbial "silver platter."

Where Federal officials actively participate in a search being conducted by private parties or stand by watching with approval as the search continues, Federal authorities are clearly implicated in the search, and it must comport with Fourth Amendment requirements. Lustig v. United States, 338 U.S. 74 (1949); United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975).

It is submitted that the telephone company ought not to be permitted to conduct on-going and unlimited investigations of its subscribers through the use of the pen register. Unquestionably, the use of the pen register constitutes an interception of a communication within the meaning of 47 U.S.C. §605, and it is submitted that the divulgence of information gleaned from the pen register after September 17th was violative of §605. See United States v. Dote, 371 F.2d 178 (7th Cir. 1966). See also Bubis v. United States, 384 F.2d 643 (9th Cir. 1967),

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wherein it was held that the telephone company's monitoring of defendant's telephone calls for a period of three months after ample evidence had been secured that defendant had been using a "bluebox," was unreasonable and therefore such recordings voluntarily given to the government were inadmissible and contrary to the provisions of 47 U.S.C. §605.

IV

THE INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE IT FAILS TO ALLEGE SUFFICIENTLY THE "SCHEME AND ARTIFICE TO DEFRAUD" COMMITTED BY DEFENDANT

Rule 7(c), F.R. Crim. P. provides in relevant part:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

The indictment in this case charges defendant with devising a "scheme and artifice to defraud the Bell Telephone Company of Nevada, by depriving said company or moneys due and payable for long distance telephone calls through the use of an electronic device commonly referred to as a 'blue box' or 'black

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box.'"

What the "scheme and artifice to defraud" referred to in the Indictment is characterized only as the use of a "blue box" or a "black box," and the manner in which such scheme is carried out is left entirely to speculation. Nothing in the Indictment suggests the manner in which a "blue box" was used to defraud the telephone company.

> "An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' United States v. Simmons, 96 U.S. 360, 362. 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves, fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; * * *' United States v. Carll, 105 U.S. 611, 612. 'Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.' (Citations omitted.) That these basic principlesof fundamental fairness retain their full vitality under modern concepts

of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, is illustrated by many recent Federal decisions." Russell v. United States, 369 U.S. 749, at pp. 765-766 (1962).

The Court's attention is invited to the very recent opinion in United States v. Louis Rex Curtis, 506 F.2d 985 (10th Cir. 1974).

In Curtis, the Court of Appeals ordered the dismissal of an indictment charging mail fraud in fiolation of 18 U.S.C. §1341 because the indictment failed to specify what aspects of the "scheme and artifice" were fraudulent.

The present indictment suffers from the same problem of insufficient allegations of fraud, and therefore, out to have been dismissed.

CONCLUSION

FOR THE FOREGOING REASONS, the Writ should issue.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

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APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROY GARNER, *Defendant-Appellant.*	No. 75-1906 MEMORANDUM

[October 21, 1975]

Appeal from the United States District Court
for the District of Nevada

Before: BROWNING and WALLACE, Circuit Judges, and WILLIAMS,* District Judge.

Appellant was convicted of a violation of 18 USC §1343, fraud by wire, after denial of his motion to suppress evidence. It was charged that defendant defrauded the Bell Telephone Company of Nevada of monies due for long distance telephone calls by use of an electronic device known as a "blue box." This is an instrument which, when attached to the telephone, permits the use of long distance facilities of the telephone company free of charge because the device circumvents the billing equipment facilities of the utility. Covey, a security agent for the telephone company, suspected that a blue box was being used on appellant's line and placed a 2600 Hertz frequency detector on the line which proved that his suspicions were accurate. On August 29, 1974 Covey placed additional equipment on the telephone line to record the date, time and telephone number dialed on a paper tape and in the next four days 35 "blue box" calls were recorded on the

*The Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

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tape. In 18 instances the called parties were identified and in two cases the caller identified himself as Roy Garner. On September 2nd the tape recorder was taken off the line but the pen register was allowed to operate until December 2, 1974. On September 20, 1974 the telephone company turned its investigation file over to the FBI at the demand of that agency and then for the first time, governmental participation in the investigation began.

Appellant contends that (a) the telephone company intercepts and discloses of the of the contents of his calls were in violation of 47 USC §605 and 18 USC §2511 and (b) were also in violation of California Penal Code §631 and (c) that the continuation of the operation of the pen register on his telephone line after removal of the Hertz detector constituted an unlawful interception of wire communications.

There is no evidence that any FBI agent directed the installation of the Hertz detector on the appellant's line or participated in any interceptions of conversations. Covey, a security officer for the telephone company, had a right to protect the property of the company by intercepting and recording enough of the call placed by use of the blue box to prove that the call was actually completed and to overhear the salutations. *U.S. v. Clegg*, 509 F.2d 605, 612 (5th Cir., 1975). We hold that the first sentence in Section 605 exempts from the prohibitions of that section those interceptions and disclosures which are authorized by 18 USC §2511(2)(a)(i) and (ii). This clearly gave Covey the right to make reasonable interceptions and recordations in an evidence gathering process that in no way involved governmental officials. A telephone company which has reasonable grounds to suspect that its billing procedure is being bypassed is authorized by 18 USC §2511(2)(a)(i) and (ii) to monitor any telephone from which it believes illegal calls are being placed. This is part of the company's protection of its rights and property.

Appellant's contention that the recorded interceptions violated California state law seems to be answered by the case of *U.S. v. Keen*, 508 F.2d 986 (9th Cir., 1974) wherein the Court said, ". . . wiretap evidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law." (page 989). If

Congress intended that telephone companies be able to monitor phone lines when necessary to protect their rights or property, then state law is preempted, at least if it conflicts with the intent behind the federal statute.

The continued use of the pen register for a period of approximately 76 days after removal of the Hertz detector from appellant's telephone line did not violate appellant's Fourth Amendment rights and merely constituted a reasonable continuation of an ongoing investigation. The pen register merely recorded on a paper tape all numbers dialed from the telephone being monitored and did not in any way record the content of conversations. The investigation by the telephone company was a private, statutorily authorized one by an employee of a company protecting its property rights. Since the FBI did not know that the company would intercept and record any portions of the calls, government action was absent.

Other matters raised on appeal are without merit.

AFFIRMED.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 24 1976

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROY GARNER,

Defendant-Appellant.

No. 75-1906

ORDER

Before: BROWNING and WALLACE, Circuit Judges, and *WILLIAMS, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*Honorable Dewey [illegible] Williams, United States District Judge, Central District of California, sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1366

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1975, and a petition for rehearing was denied on February 24, 1976. The petition for a writ of certiorari was filed on March 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain evidence introduced by the government at trial was obtained in violation of petitioner's statutory or constitutional rights and should therefore have been excluded.

2. Whether the indictment sufficiently apprised petitioner of the crime with which he was charged.

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343, and was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence at trial, which is not disputed, showed that petitioner engaged in a scheme to defraud the Bell Telephone Company of Nevada of monies due for long distance telephone calls by using an electronic device known as a "blue box."[1] In April 1974, Jack Covey, a security agent employed by the Pacific Telephone and Telegraph Company, concluded, based upon his analysis of a computer printout, that someone at petitioner's residence was using a blue box to make long distance calls free of charge (Tr. 35-39). On May 16, 1974, Covey placed a 2600 Hertz frequency detector on petitioner's telephone line, which confirmed that a blue box was being used (Tr. 45-47). On August 29, 1974, Covey placed two additional pieces of equipment on petitioner's line — a device, commonly referred to as a "pen register," to

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[1]When attached to a telephone, a blue box permits the user to by-pass the telephone company's billing equipment on long distance calls and to complete such calls free of charge. To make a call with a blue box, the user dials either the universal number for directory assistance (555-1212) or a toll-free number (one beginning with 800). Once a connection has been achieved, the user pushes a button on the box, which in turn emits a 2600 single frequency Hertz tone, signifying that the calling party has hung up. The blue box permits the user to remain connected to the company's long-distance network, however, and by pushing other buttons, producing different frequency tones, the user can simulate dialing and call any number in the world free of charge (Tr. 12-24).

record on paper the date, time and telephone number dialed and a magnetic-tape voice recorder that, when triggered by the use of a blue box, would record the first two minutes of each illegal conversation (Tr. 49-50).

For the following four days, Covey recorded the first two minutes of 35 long-distance telephone calls placed, with the aid of a blue box, from petitioner's residence. In 18 instances, the persons called were identified. Petitioner identified himself as the caller in two instances.

After September 2, 1974, Covey removed the magnetic tape recorder from the line, but he allowed the pen register to operate until December 2, 1974 (Tr. 91). Meanwhile, on September 20, 1974, Covey informed the F.B.I. about his investigation and, at the F.B.I.'s request, turned over his file on the investigation (Tr. 91). Based upon this information, the F.B.I. subsequently obtained a search warrant for petitioner's residence. During the ensuing search, the blue box was discovered (Tr. 154). At petitioner's trial, the pen register records, portions of the voice recordings and the blue box were introduced into evidence.

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that since no federal court "authorized" the interception and divulgence of the substance of any of his telephone conversations, the admission at trial of evidence concerning certain of his telephone conversations violated federal law.

The pertinent provisions of 47 U.S.C. 605 — which govern the conduct of persons "receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire * * *" — prohibit divulgence of the existence or contents of wire communications except (1) "through authorized channels of transmission or reception" or (2) "as authorized by

chapter 119, Title 18 [18 U.S.C. 2510-2520]." The complementary provisions of 18 U.S.C. 2517 permit the disclosure in court proceedings of evidence concerning the contents of wire communications obtained "by any means authorized by [chapter 119] * * *." One of the means of interception and disclosure specifically authorized by chapter 119 is through court order (18 U.S.C. 2516); but, as the phrase "by any means authorized" indicates, chapter 119 makes lawful as well other means of interception and disclosure. Specifically, 18 U.S.C. 2511(2)(a)(i) provides in pertinent part that:

> [i]t shall not be lawful under [chapter 119] for an * * * agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication * * *.

Nothing in chapter 119 supports petitioner's contention that—although "not * * * unlawful"—evidence resulting from the telephone company's interception of telephone calls placed by him with a blue box could not be admitted at trial because such conduct was not "authorized" by court order.[2] Indeed, petitioner's view of chapter 119 and of 47 U.S.C. 605, if accepted, would render

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[2]In fact, 18 U.S.C. 2515 prohibits the admission into evidence at any trial, hearing or similar proceeding of any wire or oral communication only "if the disclosure of that information would be in violation of [chapter 119]." As noted, 18 U.S.C. 2511(2)(a)(i) specifically provides that interceptions by telephone company officials—such as those involved here—"shall not be unlawful under [chapter 119] * * *."

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inadmissible in court proceedings not only communications intercepted by telephone company officials under 18 U.S.C. 2511(2)(a)(i) but also those consensual interceptions provided for under 18 U.S.C. 2511(c) and (d). See *United States* v. *White*, 401 U.S. 745, 752. In rejecting a claim similar to that made by petitioner, the Seventh Circuit recently stated in *United States* v. *Freeman*, 524 F.2d 337, 340, certiorari denied, February 23, 1976 (No. 75-5781):

> The government * * * contends that section 2511 (2)(a)(i) authorizes telephone companies to engage in limited surveillance to protect their property and to disclose information so secured to law enforcement authorities. While section 2511(2)(a)(i) may more properly be characterized as an exemption from the criminal penalties of 18 U.S.C. §2511(1) and the civil liabilities of 18 U.S.C. §2520, in view of Congress' expressed intent to permit telephone companies to engage in reasonable activities to protect their property, we agree that section 2511 (2)(a)(i) must sensibly be read as an exception of telephone companies from the relevant prohibitions of 47 U.S.C. §605, and, in a sense, as an authorization.[3]

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[3]Petitioner's suggestion (Pet. 8) that "[t]here is an apparent facial conflict between [47 U.S.C. 605] and [18 U.S.C. 2511(2)(a)] in that the former statute purports to prohibit what the latter allows" is refuted by the legislative history of the Crime Control Act, from which Section 2511(2)(a) is derived. As the court concluded in *United States* v. *Freeman*, *supra*, 524 F. 2d at 340:

> The legislative history of the Crime Control Act indicates that Congress intended section 2511(2)(a) to reflect existing law which sanctioned the use of reasonable methods by telephone companies to protect their property. S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Admin. News, p. 2182, citing *United States* v. *Beckley*, 259 F. Supp. 567 (N.D. Ga. 1965). The Senate report, furthermore, paraphrases the first sentence of revised 47 U.S.C. §605 to read: "except as authorized or

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2. Petitioner also contends (Pet. 15-17) that evidence resulting from the telephone company's investigation should have been suppressed because it was obtained in violation of state law. But even assuming that the company's conduct was contrary to state law,[4] the admissibility of the resulting evidence in the federal courts depended solely upon the status of the company's conduct under federal law. As the court of appeals correctly noted (Pet. App. A 2-3), "[i]f Congress intended that telephone companies be able to monitor phone lines when necessary to protect their rights or property, then state law is preempted, at least if it conflicts with the intent behind the federal statute." See *Ker* v. *California*, 374 U.S. 23, 31-32; *On Lee* v. *United States*, 343 U.S. 747, 754-755; *Olmstead* v. *United States*, 277 U.S. 438, 468; *United States* v. *Infelice*, 506 F. 3d 1358, 1365 (C.A. 7); *United States* v. *Keen*, 508 F. 2d 986, 989 (C.A. 9), certiorari denied, 421 U.S. 929; *United States* v. *Melancon*, 462 F. 2d 82, 92 (C.A. 5), certiorari denied, 409 U.S. 1038; *United States* v. *Sims*, 450 F. 2d 261, 262-263 (C.A. 4).

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permitted by chapter 119, title 18 * * *." *Id.* 2197. Since 18 U.S.C. §2511(2)(a)(i) permits the disclosure of intercepted communications, it cannot be doubted that Congress intended the statute as an exception to the prohibitions of revised 47 U.S.C. §605.

See also *United States* v. *Clegg*, 509 F. 2d 605, 611-612 (C.A. 5).

[4]While the California wire interception statute (Calif. Penal Code, Section 631 (1970)) does not contain a provision precisely equivalent to 18 U.S.C. 2511(2)(a)(i), it does permit telephone company officials to intercept wire communications for purposes, *inter alia*, related to the "conduct or operation of the services and facilities of such public utility" (Calif. Penal Code, §631[b]). It is not unreasonable to assume, and petitioner cites no California case suggesting the contrary, that the California courts would find that interception by telephone company officials of telephone calls placed by petitioner with a blue box related to the "conduct or operation" of the company's services and facilities and was therefore lawful.

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3. Petitioner contends further (Pet. 17-19) that the telephone company acted unreasonably in leaving the pen register on his phone (although removing the Hertz detector and voice recording equipment) after it had "completed [its] investigation of possible fraud" and turned over its file to the FBI. But as the court of appeals properly concluded (Pet. App. A 3):

> The continued use of the pen register for a period of approximately 76 days after removal of the Hertz detector from [petitioner's] telephone line did not violate [petitioner's] Fourth Amendment rights and merely constituted a reasonable continuation of an ongoing investigation. The pen register merely recorded on a paper tape all numbers dialed from the telephone being monitored and did not in any way record the content of conversations. The investigation by the telephone company was a private, statutorily authorized one by an employee of a company protecting its property rights. Since the F.B.I. did not know that the company would intercept and record any portions of the calls, government action was absent.

Petitioner also appears to argue (Pet. 18) that as of September 20, 1974, federal authorities were "clearly implicated in the search" and, accordingly, were required to obtain a warrant before further use of the pen register by the telephone company.[5] The factual premise

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[5]It is settled that the use of a pen register does not entail an "aural acquisition" of communications under chapter 119 of Title 18, and is therefore not an "interception" for purposes of that chapter (see 18 U.S.C. 2510(4)). Consequently, "the permissibility of [the use of a pen register] by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment" (*United States* v. *Giordano*, 416 U.S. 505, 553-554; concurring and dissenting opinion of Mr. Justice Powell). We

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of this argument is refuted by the evidence at trial, which showed that the FBI did not become aware of the continued use of the pen register until it was notified of that fact by the telephone company at the end of November, shortly before the device was removed (Tr. 158). Thus, the continuing investigation by the company remained "a private, statutorily authorized one by an employee of a company protecting its property rights * * * [and] government action was absent" (Pet. App. A 3).[6]

4. Finally, petitioner contends (Pet. 20) that the indictment did not provide him with sufficient notice of the crime of which he was accused because it charged only a scheme to defraud the telephone company by the use of a blue box but did not indicate the manner in which a blue box had been used to defraud the company. The use of a blue box, however, under the commonly understood and readily ascertainable meaning of that term as a

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submit, however, that it is by no means clear that the use of a pen register even constitutes a search within the meaning of the Fourth Amendment so that a search warrant would be required for its use by government officials. As the Fifth Circuit held in *United States* v. *Clegg*, *supra*, 509 F. 2d at 610, "[t]he Fourth Amendment * * * protects only the content of a telephone conversation and not the fact that a call was placed or that a particular number was dialed." Accord, *United States* v. *Baxter*, 492 F. 2d 150, 167 (C.A. 9). There is no need for this Court to address that issue here, however, since, as noted, the telephone company's use of a pen register in this case was, from beginning to end, neither at the behest nor with knowledge of government officials.

[6]Petitioner's reliance upon *Lustig* v. *United States*, 338 U.S. 74, is therefore misplaced. Unlike the situation presented in *Lustig*, the F.B.I. did not here either "actively participate in a search being conducted by" others or "stand by watching with approval as [a] search continue[d]." *United States* v. *Mekjian*, 505 F. 2d 1320, 1327 (C.A. 5); see 338 U.S. at 78.

device for bypassing the telephone company's billing procedures, itself constitutes a scheme to defraud; and the indictment in this case so stated by charging petitioner with a scheme to defraud the telephone company over a seven-month period "by depriving [it] o[f] moneys due and payable for long distance telephone calls through the use of an electronic device commonly referred to as a 'blue box' * * *." Moreover, at the pretrial hearing on petitioner's motion to suppress, his counsel demonstrated a complete understanding of the nature of the offense with which petitioner was charged (Tr. of February 14, 1975, pp. 24-27). Petitioner could have, had he deemed it necessary, sought additional detail regarding the alleged scheme by requesting a bill of particulars.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1976.